

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 981

[Docket No. FV94-981-4 PR]

#### Almonds Grown in California; Reduction of Expenses and Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** This proposed rule invites comments on revising the expenses and assessment rate previously established under Marketing Order No. 981 for the 1994-95 crop year. This proposal would reduce the budget of expenses and rate which almond handlers may be assessed for funding expenses by the Almond Board of California (Board) that are reasonable and necessary to administer the program.

**DATES:** Comments received by April 24, 1995, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this action. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456, FAX 202-720-5698. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Kathleen M. Finn, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2536-S, Washington, DC 20090-6456, telephone 202-720-1509, or FAX (202) 720-5698; or Martin Engeler, Assistant Officer-In-Charge, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey

Street, Suite 102B, Fresno, California 93721, telephone 209-487-5901, or FAX (209) 487-5906.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement and Order No. 981, both as amended [7 CFR part 981], regulating the handling of almonds grown in California. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

The Department of Agriculture (Department) is issuing this proposed rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the provisions of the marketing order now in effect, California almonds are subject to assessments. It is intended that the assessment rate as proposed herein will be applicable to all assessable almonds handled during the 1994-95 crop year, which began July 1, 1994, and ends June 30, 1995. This proposed rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A), any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 7,000 producers of California almonds under this marketing order, and approximately 115 handlers. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. The majority of California almond producers and handlers may be classified as small entities.

A budget of expenses and rate of assessment for the 1994-95 crop year was recommended on May 18, 1994, by the Board, the agency responsible for local administration of the program. An interim final rule was issued in the **Federal Register** on July 14, 1994, [59 FR 35847] and a final rule was issued in the September 8, 1994 **Federal Register** [59 FR 46321]. Approved expenditures total \$9,435,262 with an approved assessment rate of 2.25 cents per pound. Of the 2.25 cents per pound, handlers could receive credit-back against their assessment obligation up to one cent per pound for their own promotional expenditures. Specific explanations of various expenditure categories and comparisons with a prior period are contained in the aforementioned final rule.

The Board met on September 14, 1994, and recommended, by a seven to two vote, postponing its paid advertising campaign and directly related activities until further notice. It also voted to postpone assessment billings pending evaluation of legal issues and future program activities. Generic public relations activities and other promotion-related activities to which the Board was contractually committed at that time are to be continued. This action was taken as a result of uncertainty created by legal

decisions regarding the Board's former advertising and promotion program.

Specifically, the Ninth Circuit Court of Appeals ruled in December 1993, that aspects of the Board's former advertising and promotion program in the 1980's were unconstitutional. On remand, the district court subsequently awarded plaintiff handlers refunds of assessments and other money spent under the program. This decision was issued on September 6, 1994, which led to the Board's actions to postpone advertising activities at its September 14, 1994, meeting. The district court's remand decision is currently being appealed. In addition, several handlers filed legal challenges to the Board's current credit-back advertising and promotion program, pursuant to Section 608(c)(15)(A) of the Act.

The Board again met on November 30, 1994, and recommended, by a seven to three vote, reducing the assessment rate by eliminating the portion applicable to credit-back to handlers for their own promotional activities (one cent), and by eliminating the portion of the remaining assessment applicable to generic promotion activities. The resulting assessment rate the Board recommended handlers pay was .47 cents per pound. Concurrently, the Board again postponed assessment billings pending further evaluation of the Board's financial status. These actions were taken because of the apparent lack of support by some handlers at the present time for generic promotion and credit-back programs, demonstrated by legal challenges filed by such handlers representing a significant portion of the industry volume. One Board member commented that since the handlers who have filed legal challenges are not likely to pay the advertising assessment, it is not equitable for the remainder of the industry to shoulder the expense of an advertising program.

The Board met again on February 1, 1995, and recommended, by a six to four vote, to further reduce the assessment rate. The Board recommended an assessment rate of .25 cents per pound. This action was taken after the Board further evaluated its financial position and current and future program activities.

If implemented and collected, an assessment rate of .25 cents per pound will generate income of \$1,675,000 based on an estimated assessable crop of 670 million pounds. When combined with cash and cash equivalents held by the Board, this would provide the Board with sufficient income to meet its administrative expenses and those promotional expenses to which it is

contractually obligated for the remainder of the current fiscal year.

To reduce the budget of expenses previously approved (\$9,435,262), the Board deleted the funds budgeted for reserve replenishment (\$300,000) and at its November 30, 1994, meeting, postponed a major portion (\$3.9 million) of the \$4.7 million funds budgeted for promotional activities. These revisions would reduce the budget to \$5,235,262. The reduced budget would provide the Board with sufficient capital to carry into the next fiscal year to finance operations prior to collection of future assessments.

Concerns were raised that the reduction of the assessment rate mid-way through the crop year may generate complaints from those handlers who relied on the final rule of September 8, 1994, which established an assessment rate of 2.25 cents per pound, of which handlers could receive credit-back up to one cent per pound for their own promotional expenditures. Some handlers have incurred expenses that would be eligible for credit-back under the provisions of that rule.

If the assessment rate is reduced with no portion being creditable, there will be no assessment for these handlers to claim credit-back against. However, an assessment rate of .25 cents per pound is significantly lower than the current rate of 2.25 cents. Under the current established assessment of 2.25 cents, if handlers claimed credit-back for the entire one cent, they would still be required to pay 1.25 cents per pound to the Board. Handlers would pay significantly less even if they conducted advertising for which they believed credit-back would be obtained. In addition, benefits are derived from advertising undertaken by these handlers.

This action would reduce the assessment obligation imposed on handlers. The assessments would be uniform for all handlers. The assessment cost would be offset by the benefits derived by the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Interested persons are invited to submit their views and comments on this proposal. Comments received within 30 days of publication of this proposed rule in the **Federal Register** will be considered prior to any final action being taken.

## List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is proposed to be amended as follows:

### PART 981—ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Section 981.341 is revised to read as follows:

#### **§ 981.341 Expenses and assessment rate.**

Expenses of \$5,235,262 by the Almond Board of California are authorized for the crop year ending June 30, 1995. An assessment rate for the crop year payable by each handler in accordance with § 981.81 is fixed at .25 cents per kernel pound of almonds. Of the .25 cents assessment rate, none is available for handler credit-back pursuant to § 981.441.

Dated: March 21, 1995.

**Sharon Bomer Lauritsen,**

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 95-7336 Filed 3-23-95; 8:45 am]

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## 7 CFR Part 1036

[Docket No. DA-95-13]

### Milk in the Eastern Ohio-Western Pennsylvania Marketing Area; Proposed Termination of Certain Provisions of the Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed termination of rule.

**SUMMARY:** This document invites written comments on a proposal to terminate the advertising and promotion provisions of the Eastern Ohio-Western Pennsylvania order. Termination of the provisions was requested by several associations of dairy farmers whose milk is pooled under the order. Termination would eliminate redundant expenses in administering regional advertising and promotion programs without affecting producers' participation.

**DATES:** Comments are due on or before April 7, 1995.

**ADDRESSES:** Comments (two copies) should be filed with the USDA/AMS/ Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456.